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EXAMINER	
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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/643,055
Filing Date: August 18, 2003
Appellant(s): REUSCHE ET AL.

David Z. Petty
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4/18/06 appealing from the Office action mailed 1/31/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,336,399	Kajisono	08-1994
4,166,086	Wright	08-1979

3,836,130	Earhart et al.	09-1974
5,465,279	Bengel	11-1995

(9) **Grounds of Rejection**

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-5, 7, 8, 10, 12, 14-18, 20, 21, 23, 25, 27-30, and 33 are rejected under 35 U.S.C. 102(b) as being anticipated by Kajisono (US 5,336,399; see Figures 1 and 7 of Kajisono attached at the end of this Examiner's Answer for further explanation).

For claim 1, Kajisono discloses a water agitation system configured to be positioned within a water retention structure configured to receive and retain water, said system comprising:

a main body positionable within a water retention area of the water retention structure, said main body comprising a base removablv intercormected to a cover, and an inner compartment defined between said base and cover; and

an agitator operatively connected to a motor (40) housed within said main body, said agitator connected to a distal end of a drive shaft that extends outwardly from said main body, said agitator comprising at least one agitation member outwardly extending from a lateral surface of said distal end of said drive shaft, said motor configured to rotate said agitator in order to stir water retained within the water retention structure,

wherein said at least one agitation member is operable to stir the water within the water retention structure (note that in lines 40-50 of col. 4 and Figure 7, Kajisono discloses the use of impellers/agitation member outwardly extending from a lateral surface of the distal end of the drive shaft wherein the motor configured to rotate the impellers/agitation member in order to stir water),

said motor being positioned within said inner compartment.

For claims 2 and 15 and 28, Kajisono discloses said water retention structure is a basin of a bird bath (note that Kajisono's water agitation system is capable of being used in a bird bath (see lines 63-68 of col. 2 and lines 62-68 col. 6)).

For claims 3 and 16 and 29, Kajisono discloses said water retention structure is a livestock water trough (note that Kajisono's water agitation system is capable of being used in a livestock water trough (see lines 63-68 of col. 2 and lines 62-68 col. 6)).

For claims 4 and 17 and 30, Kajisono discloses said water retention structure is one of a swimming pool, water tower, and pond see lines 63-68 of col. 2 and lines 62-68 col. 6).

For claims 5 and 18, Kajisono discloses said cover is dome shaped (see Figure 3).

For claims 7 and 20, Kajisono discloses a support member (17) configured to support said main body above a bottom surface of the water retention structure.

For claims 8 and 21, Kajisono discloses the support member comprises a plurality of legs (17) that extend downwardly from said main body.

For claims 10 and 23 and 33, Kajisono discloses said motor is electrically connected to a standard electrical outlet (70).

For claims 12 and 25, Kajisono discloses said agitator comprises at least one blade (40-50 of col. 4 and Figure 7) extending from a lateral surface of said drive shaft that is rotatably driven by said motor.

For claim 14 (see claim 1 above for similar claimed features), Kajisono discloses a water agitation system for use with a water retention structure comprising:

a motor operatively connected to a proximal end of a drive shaft;

a base supporting said motor:

a cover positioned over said motor, said cover being removably interconnected to said base and an inner compartment defined between a perimeter of said base and said

cover, said motor being positioned within said inner compartment; and

a blade assembly extending outwardly from said drive shaft, said motor operable to rotate said blade assembly in order to stir water retained within the water retention structure (see lines 40-50 of col. 4 and Figure 7).

For claim 27 (see claim 1 above for similar claimed features), Kajisono discloses a water agitation system adapted to be positioned within a water retention structure configured to receive and retain water, said system comprising:

a main body positioned within a water retention area of the water retention structure, said main body having a base removably secured to a cover, and an inner compartment defined between said base and cover,

support members (17) supporting said main body above a bottom surface of the water retention structure; said support members comprising a plurality of legs that extend downwardly from said main body;

an agitator operatively connected to a motor positioned within said inner compartment of said main body, said agitator connected to a distal end of a drive shaft that extends outwardly from said main body, said agitator having at least one blade outwardly extending from a lateral surface of said drive shaft that is rotatably driven by said motor in order to stir water retained within the water retention structure (see lines 40-50 of col. 4 and Figure 7).

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

4. Claims 6, 19, and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kajisono (US 5,336,399) in view of Official Notice.

As described above, Kajisono discloses most of the claimed invention except for a seal member interposed between the cover and the base.

However, an Official Notice is taken that the concept of using a seal member interposed between two structural members in order to prevent leakage and/or infiltration thus provide a better seal therebetween is old and well known technique in the art. It would have been obvious in view of Official Notice to one having ordinary skill

in the art at the time the invention was made to have modified Kajisono's water agitation system so as to include a seal member interposed between the cover and the base, in order to prevent leakage and/or infiltration thus provide a better seal therebetween the two members.

5. Claims 9, 22, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kajisono (US 5,336,399) in view of Wright (US 4,166,086).

As described above, Kajisono discloses most of the claimed invention except for the motor is battery powered.

Wright teaches a similar water agitation system as that of Kajisono in which Wright's system having a battery powered motor (see lines 66-68 of col. 2 and lines 1-3 of col. 3). It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Kajisono's water agitation system so as to include a battery powered motor, in a similar manner as taught in Wright, for easy portability.

6. Claims 11, 24, and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kajisono (US 5,336,399) in view of Earhart et al. (US 3,836,130).

As described above, Kajisono discloses most of the claimed invention except for at least one of a switch, timer and sensor for selectively activating and deactivating said motor.

Earhart et al. teach a similar water agitation system as that of Kajisono in which Earhart et al.'s system having at least one of a switch, timer and sensor for selectively activating and deactivating said motor (see lines 55-68 of col. 4 and lines 1-10 of col. 5).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Kajisono's water agitation system so as to include either a switch, timer or sensor, in a similar manner as taught in Earhart et al., so that the motor can be activated and/or deactivated more efficiently.

(10) Response to Argument

Appellant argues that Kajisono does not teach 1) "an agitator comprising at least one agitation member outwardly extending from a lateral surface of said distal end of said drive shaft, said motor configured to rotate said agitator in order to stir water retained within the water retention structure, wherein said at least one agitation member is operable to stir the water within the water retention structure " as recited in claim 1, 2) "a blade assembly extending outwardly from said drive shaft, said motor operable to rotate said blade assembly in order to stir water retained within the water retention structure" as recited in claim 14, and 3) "an agitator having at least one blade outwardly extending from a lateral surface of said drive shaft that is rotatably driven by said motor in order to stir water retained within the water retention structure" as recited in claim 27, the Examiner disagrees. As shown in lines 40-50 of col. 4 and Figure 7, Kajisono discloses the use of impellers/agitation member/blade assembly outwardly extending from a lateral surface of the distal end of the drive shaft wherein the motor operable to rotate the impellers/agitation member/blade assembly in order to stir water retained within the water retention structure.

Furthermore, it is noted that claiming of an element to perform certain action (in this case, the impellers/agitation member/blade assembly stirs the water retained within

the water retention structure) is intended or desired use and is not a positive limitation but only requires the ability to so perform, therefore, it does not constitute a limitation in any patentable sense. Further, note that it is well settled case law that such limitations, which are essentially method limitations or statements or intended or desired use, do not serve to patentably distinguish the claimed structure over that of the reference. See In re Pearson, 181 USPQ 641; In re Yanush, 177 USPQ 705; In re Finsterwalder, 168 USPQ 530; In re Casey, 152 USPQ 235; In re Otto, 136 USPQ 458; Ex parte Masham, 2 USPQ 2nd 1647; and MPEP 2114 & 2115. It is noted that when the impellers/agitation member/blade assembly rotates, the water around and/or surround the impellers/agitation member/blade assembly will be stirred somewhat. In addition, the claim language in claim 1 uses functional language of "configured to rotate said agitator in order to stir water retained within the water retention structure", so as long as the water agitation system of Kajisono has a motor similar to Appellant's invention and which it does, then Kajisono's motor is configured to perform that function which is to rotate the agitator in order to stir water retained within the water retention structure.

Appellant further argues that Kajisono does not teach a base removable interconnected to a cover, the Examiner disagrees. As shown in Figure 1 of Kajisono, it is inherently that cover (16) is removably interconnected to the base due to those fastener means, which locate around the base of the cover, for connecting the cover to the base (see Figure 1 attached at the end of this Examiner's Answer for further explanation).

Since Appellant has challenged the Official Notice, reference Bengel (US 5,465,279), which discloses that the concept of using a seal member (110) interposed between two structural members (in this case, the cover (104, 112) and the base (102)) in order to provide a water-tight seal between the two structural members, has been cited, which for purposes of appeal can be treated as having been substituted for the Official Notice taken herein.

Finally, in response to appellant's argument that there is no suggestion to combine the references (i.e., Kajisono in view of Bengel), the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In response, the Examiner maintains that there is motivation to combine the references. Kajisono stands for the basic premise of having two structural members connecting to one another (in this case, the cover connecting to the base) and Bengel stands for the basis premise of having two structural members connecting to one another wherein a seal member interposed between the two structural members so as to create a water-tight seal between the two structural members (in this case, the cover (104, 112) connecting to the base (102) wherein a seal member (110) interposed between the cover and the base). Therefore, one of ordinary skill in the art would indeed look to the teaching of Bengel to learn how to provide a water-tight seal between

two connecting structural members by interposing a seal member between the two connecting structural members.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Primary AU3644, Trinh Nguyen

Conferees:

SPE 3644, Teri Luu TL

Primary 3643, Son Nguyen SN

Fig. 1

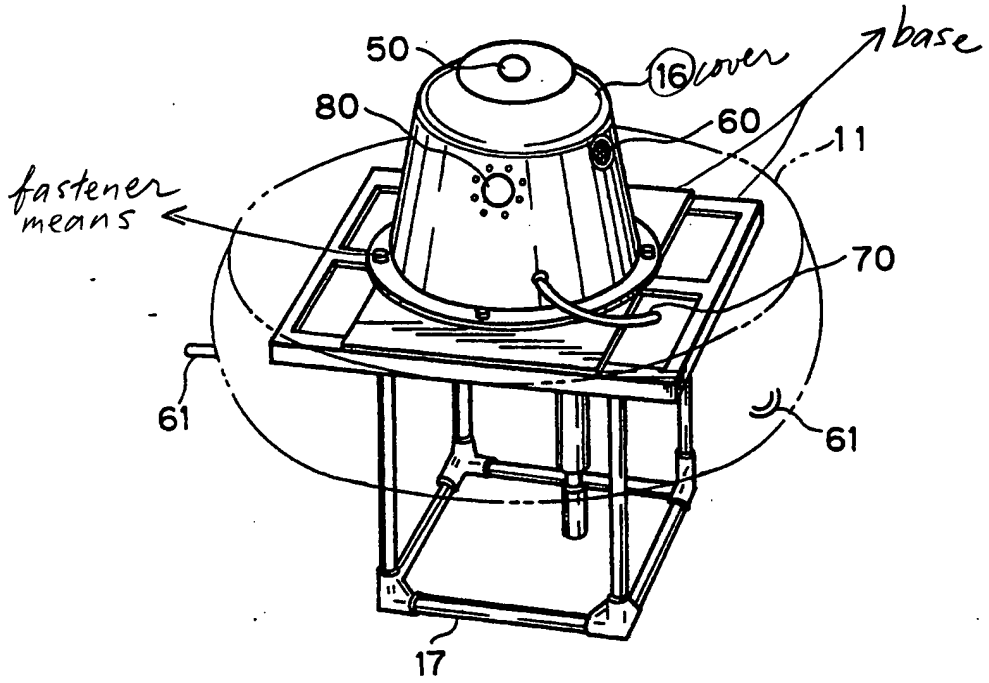

50
16 cover
base
80
60
11
fastener means
70
61
61
17

Fig. 2

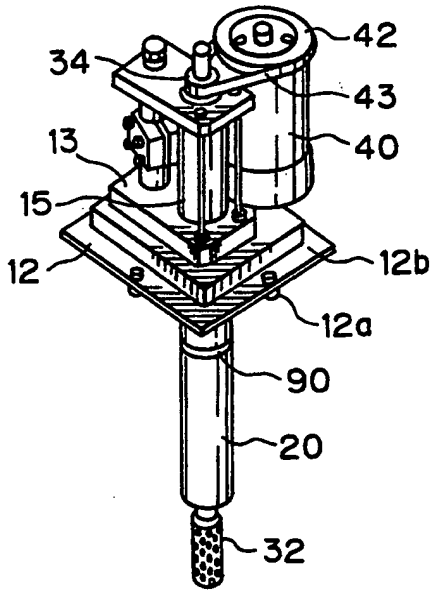
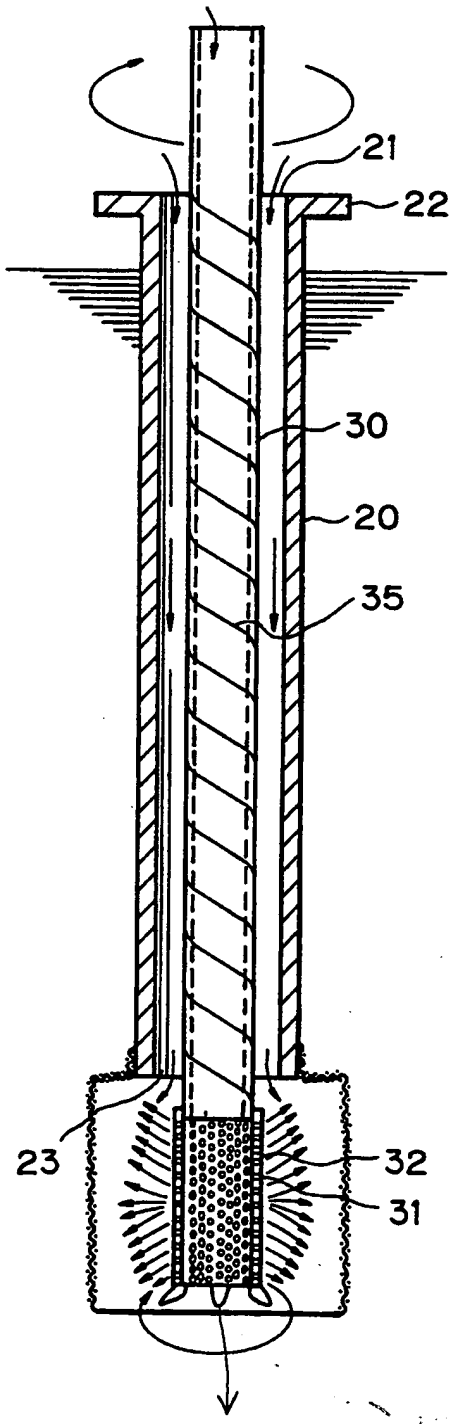

8
42
34
43
13
40
15
12
12b
12a
90
20
32

Fig. 7



agitation member/blade assembly/impellers